IN THE COURT OF JUSTICE

OF THE EUROPEAN COMMUNITIES

Case C-394/07

MARCO GAMBAZZI

-v-

DAIMLER CHRYSLER CANADA INC AND CIBC MELLON TRUST COMPANY

WRITTEN OBSERVATIONS OF THE UNITED KINGDOM

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10 December 2007

I Introduction and answer to the questions referred

1. Pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the European Communities, and pursuant to Article 5(1) of the Protocol of 3 June 1971 on the interpretation of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters ("the Brussels Convention"), the United Kingdom submits the following observations on the questions referred for a preliminary ruling by order of the Corte d'Appello di Milano (Italy) ("the Order for Reference") lodged on 22 August 2007.

2. Those questions have arisen in proceedings between Mr Gambazzi, a Swiss citizen resident in Lugano, on the one hand, and DaimlerChrysler Canada Inc. and CIBC Mellon Trust Company (together, "DaimlerChrysler Canada"), with registered offices in Canada, on the other hand. The questions relate to the enforcement by the courts of the Italian Republic of a judgment of 10 December 1998 and subsequent order of 17 March 1999 of the High Court of Justice of England and Wales [Annex 1]. By that judgment, Mr Gambazzi was ordered to pay to The Canada Trust Company and other parties, whose rights are now vested in DaimlerChrysler Canada, damages in the amount of CAN 169 752 078, CAN 71 595 530 and USD 129 974 770, together with costs. The Canada Trust Company and the other parties, who were the trustees of a number of Canadian pension funds, claimed to have been the victim of a series of frauds perpetrated, *inter alia*, by Mr Gambazzi.

3. The referring court asks, in essence, whether a judgment of a Contracting State rendered in civil proceedings in which a party was debarred from presenting his defence pursuant to a court order because of that party's persistent and intentional failure to comply with previous orders in the same proceedings is contrary to public policy within the meaning of Article 27(1) of the Brussels Convention. The United Kingdom respectfully suggests that the Court of Justice ought to direct the Italian court to conclude that a judgment rendered in such circumstances is, for the reasons set out below, not contrary to public policy within the meaning of that provision.

4. Before making its legal submissions, the United Kingdom will address, firstly, the rules of English court procedure in issue, and, secondly, the facts and procedure of the

proceedings leading to the judgment of the English High Court whose recognition and enforcement is now challenged before the Italian courts.

II The rules of English court procedure in issue

(i) Freezing orders or Mareva injunctions

5. An English court may grant an interim remedy in the form of an order (i) restraining a party from removing from the jurisdiction assets located there, or (ii) restraining a party from dealing with any assets whether located within the jurisdiction or not. Such an order, which may now be granted pursuant to the Civil Procedure Rules 1998, r. 25.1(1), in force since 1999, is commonly referred to as a "Freezing order" or a Mareva injunction.[1]

6. This interim remedy is granted to protect the efficacy of court proceedings, in particular, to prevent a defendant dissipating his assets with the intention or effect of frustrating enforcement of a prospective judgment. It is an important means of ensuring the effective enforcement of judgments in the field of international commercial litigation.

7. An English court also has the power to order disclosure of documents designed to enable claimants to ascertain the whereabouts of the defendant's assets. Such an order is commonly ancillary to a Freezing order. It may be granted pursuant to the Civil Procedure Rules 1998, r. 25.1(1)(g) The court has jurisdiction to grant such an order under the Rules of the Supreme Court Order 29, 1.1A.

8. The United Kingdom draws the Court of Justice's attention to the fact that the English courts exercise considerable care before ordering a defendant to disclose information about his assets. In particular, the courts will not order such disclosure if to do so would invite a significant risk of self-incrimination and that a defendant might be subjected to criminal penalties in proceedings in another state. This was expressly recognised by the former Chief Justice, Lord Bingham of Cornhill, in the case of *Credit Suisse Trust SA v Cuoghi* [1997] 3 All ER 724 at 736.

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[1] From the case *Mareva Compania Naviera SA v International Bulkcarriers SA* [1975] 2 Lloyd's Rep 509, which is one of the first recorded instances of such an order in English case-law.

(ii) Peremptory, final or unless orders

9. To encourage a party to carry out his duty to help the court to ensure the fair and efficient administration of justice in order to deal with cases justly — commonly referred to before the English courts as the "overriding objective"— a court order may be made subject to conditions, namely compliance within a specified period of time, and may also specify the consequence of failure to comply with an order or condition. This is now expressly provided for by the Civil Procedure Rules 1998, r.3.1(3) [Annex 2]. This may take the form of an order debarring a party from taking any further part in proceedings *unless*, by a date specified in the order, he complies with the previous order. This is commonly known as an "Unless order".

10. In the case of *Hytec Information Systems Ltd v Coventry City Council* [1997] 1 WLR 1666, the Court of Appeal (England and Wales), sitting as Lord Woolf M.R., Auld and Ward L.JJ., considered the "philosophy" and application of an unless order to be as follows (judgment of Ward L.J at pp. 1674 H — 1675 C:

> "(1) An unless order is an order of last resort. It is not made unless there is a history of failure to comply with other orders. It is the party's last chance to put his case in order. (2) Because that was his last chance, a failure to comply will ordinarily result in the sanction being imposed. (3) This sanction is a necessary forensic weapon which the broader interests of the administration of justice require to be deployed unless the most compelling reason is advanced to exempt his failure. (4) It seems axiomatic that if a party intentionally or deliberately (if the synonym is preferred) flouts the order then he can expect no mercy. (5) A sufficient exoneration will almost inevitably require that he satisfies the court that something beyond his control has caused his failure to comply with the order. (6) The judge exercises his judicial discretion in deciding whether or not to excuse. A discretion judicially exercised on the facts and circumstances of each case on its own merits depends on the circumstances of that case; at the core is service to justice. (7) The interests of justice require that justice be shown to the injured party for the procedural inefficiencies caused by the twin scourges of delay and wasted costs. The public interest in the administration of justice to contain those two blights upon it also weights very heavily. Any injustice to the defaulting party, though never to be ignored, comes a long way behind the other two."

11. As a matter of practice, unless orders play a significant role in securing the effective operation of Freezing orders.

12. Where an unless order provides that a party should be debarred from defending a claim unless the terms of the order are complied with, and the party does not comply, the other party can obtain judgment with costs.

13. Where judgment has been entered against a party in default of compliance with unless orders of the court, it is open to a party to seek to have that judgment set aside. Such relief may now be sought pursuant to the Civil Procedure Rules 1998, r.3.9. If a judge refuses to set aside a judgment, that refusal may be appealed.

14. As with any order made in English court proceedings, intentional failure to comply with an Unless order could result in a litigant being in contempt of court. There is, moreover, a general power of the court to debar a party in contempt from being heard (see *Days Healthcare UK Ltd v Pihsiang Machinery Manufacturing Co Ltd and others* [2006] EWHC 1444 (QB) (Langley J), 4 All ER 233). However, an English court may, in certain cases, exercise its discretion to hear a person in contempt of court (see *X. Ltd v Morgan-Grampian* [1991] 1 AC 1).

III The facts and procedure leading to the judgment of the English High Court

15. The facts which led to the English High Court rendering a judgment against Mr Gambazzi in circumstances where it had debarred him from presenting his defence are of particular significance to the question referred and, accordingly, will be addressed, in some detail, by the United Kingdom.

16. In 1996, prior to proceedings being issued against Mr Gambazzi by DaimlerChrysler Canada, the High Court of Justice of England and Wales granted a Freezing order against Mr Gambazzi, along with a number of other parties, restraining him from dealing with his assets.

17. On 26 February 1997, an amended Freezing order was granted by the High Court (Chancery Division) (Mr Justice Rimer). Orders were also made which required that Mr Gambazzi was to disclose details of his assets and of information and documents in his possession, custody or power relating to certain funds, transactions and businesses which DaimlerChrysler Canada alleged were the means by which they had been defrauded. The terms of the order provided that any document that Mr Gambazzi claimed was protected by privilege or would involve the risk of his being prosecuted was protected from disclosure.

18. On 11 March 1997, the Swiss authorities served Mr Gambazzi with a writ of summons and the Freezing order of 26 February 1997, along with a summons requiring him to attend an inter partes hearing on 25 March 1997. At that hearing, Mr Gambazzi, who was represented by a barrister, applied for and was granted extra time within which to comply with the disclosure orders.

19. On 27 March 1997, Mr Gambazzi's solicitors filed an Acknowledgement of Service form in the High Court, in which they indicated that Mr Gambazzi disputed the jurisdiction of the English courts. Following a four-day hearing, Mr Justice Rattee, a judge of the High Court (Chancery Division), rejected Mr Gambazzi's challenge to the jurisdiction of the English courts, and extended the validity of the Freezing order. Mr Gambazzi appealed against the judgment dismissing his challenge to jurisdiction to the Court of Appeal. The Court of Appeal (England and Wales) made various rulings on 29 October 1997, and, by further judgment of 6 May 1998, dismissed Mr Gambazzi's appeal. The House of Lords gave permission to Mr Gambazzi to appeal the Court of Appeal's dismissal, and the House of Lords dismissed that appeal on 12 October 2000.

20. In order to secure Mr Gambazzi's compliance with the disclosure orders of 26 February 1997, DaimlerChrysler Canada applied for an Unless order that, unless Mr Gambazzi complied with these disclosure requirements "the defence (if any has been served) be struck out and he be debarred from defending the proceedings further".

21. On 10 July 1998, Mr Justice Rattee made a number of such Unless orders, in the form that, unless Mr Gambazzi served an affidavit as required on DaimlerChrysler Canada's solicitors within 28 days, any defence filed by him should be struck out and he should be debarred from defending the action further. This was the first set of Unless orders made against Mr Gambazzi. At the same time, Mr Gambazzi made an application to discharge the Freezing order, which was dismissed by a judgment of the High Court. On 25 September 1998, the Court of Appeal dismissed Mr Gambazzi's application for leave to appeal against that judgment, Lord Justice Robert Walker stating that "I can see no grounds for criticizing the Judge's exercise of his discretion".

22. Mr Gambazzi then made an application to the High Court to obtain the discharge of the first set of Unless orders of 10 July 1998. At the same time, DaimlerChrysler Canada made an application for a second set of Unless orders, to take account of Mr

Gambazzi's persistent non-compliance with the disclosure requirements in the Freezing order, requesting that the court order Mr Gambazzi be debarred from defending the action and further that DaimlerChrysler Canada be permitted to enter judgment against Mr Gambazzi.

23. On 12 October 1998, these two applications were heard by Mr Justice Rattee. During that hearing, Mr Gambazzi's barrister, Mr Bloch QC expressly raised, for the first time, the argument that the effect of an unless order debarring Mr Gambazzi from defending the action would be a breach of Article 6(1) of the European Convention of Human Rights (ECHR), citing case-law of the European Court of Human Rights in support of that argument. From the transcript of those proceedings [Annex 3], it would appear that Mr Gambazzi's barrister referred, *inter alia,* to the judgments in *Ashingdane v the United Kingdom*, judgment of 28 May 1985, Series A no. 93, and *Poitrimol v France*, judgment of 23 November 1993, Series A No 277-A.

24. By judgment of 13 October 1998 (*Canada Trust Co and others v Stolzenberg and others (No 3)* [1998] All ER (D) 449) [Annex 4], Mr Justice Rattee dismissed Mr Gambazzi's application and made further unless orders against him. The judgment records the following [Annex 4 p.2]:

> "It is common ground that each of the CC Defendants has failed to comply fully with my orders including, in the case of the Second Defendant, some of the Unless Orders made by me in July.
>
> It is clear from affidavits filed on behalf of the CC Defendants that they have no intention of complying further with my orders."

25. The judge continued that:

> "Given the fact that the CC Defendants are admittedly in breach of the existing orders of this court, and, in the case of [Mr Gambazzi] of obligations already made the subject of Unless Orders, which as a result have already had the effect of debarring him from defending the action, and given that it is clear from the evidence filed by the CC Defendants that they intend deliberately to continue to fail to comply with the existing orders, it would seem, prima facie, obvious that it is appropriate that the Court should now take the further steps sought by the Plaintiffs; namely, to give one further chance to the CC Defendants to comply with the existing orders of the Court, in default of which the Plaintiffs should be able to enter judgment and put the process of the taking of accounts sought by the Statement of Claim into operation."

26. The judgment, therefore, imposed a second set of Unless orders upon Mr Gambazzi, giving him a second opportunity to comply with the disclosure requirements ordered by the court before he would be debarred from defending the claim.

27. As regards Article 6(1) of the ECHR, the learned judge found as follows [at p7 line 20 – p.9 line 10 of the judgment]:

> "Turning, then to the Plaintiff's application, Mr Bloch sought to resist this on the general basis that it was contrary to principle and to Article 6 of the European Convention on Human Rights, that is to say the right to a fair trial, that judgment should now be permitted to be entered against the CC Defendants without their being allowed to defend the action.
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> In support of that proposition Mr Bloch cited various authorities which he submitted established that the Court should not refuse to hear a party in contempt unless the contempt was such a itself to prejudice a fair trial. In other words, even a deliberate contempt of Court should not be visited with a disproportionate penalty.
>
> If that argument had any validity it should, of course, have been raised in opposition to my making the orders of 10th July, because it would have applied as much to those as it does to any orders I am asked to make today. It was not. Neither was it raised in the application to the Court of Appeal for leave to appeal against my orders.
>
> In my judgment it was rightly not raised on either occasion because the common form Unless Order debarring a defendant from defending, unless he complies with a previous order of the Court, is in no way inconsistent with the authorities cited by Mr Bloch or with Article 6 of the European Convention on Human Rights.
>
> [...]
>
> I do not accept that it can be said with any degree of sense that a defendant is deprived of such a right by the Court's debarring him from defending only because he deliberately refuses to comply with order of the Court made in the self same proceedings. It is he who deprives himself of the right to a trial by deliberately acting in contempt of Court."

28. Mr Justice Rattee considered that that view was supported by the decision of the Court of Appeal in *Hytec Information Systems Ltd v Coventry City Council* [1997] 1 WLR 1666, referred to above.

29. Mr Gambazzi was refused leave by Mr Justice Rattee to appeal the second set of Unless orders to the Court of Appeal. The United Kingdom understands that Mr Gambazzi did not exercise his procedural right to seek leave to appeal from the Court of Appeal itself.

30. As regards the judgment and order whose enforcement is now sought before the Italian courts:

    a. On 10 December 1998, following the non-compliance by Mr Gambazzi with the terms of the unless orders, the High Court entered judgment against him, which was served upon him on 14 December 1998;

    b. The United Kingdom understands that Mr Gambazzi was summoned to attend the hearing leading to the order of 17 March 1999, but failed to do so, and he was subsequently served with that order;

    c. in an affidavit of 29 November 2002, Mr Gambazzi swore that he had made a deliberate decision not to comply with the orders of the English court, and, instead, to focus on disputing the jurisdiction of the English courts;

    d. Mr Gambazzi made no application to set aside the judgment entered in default on 10 December 1998.

IV Issues raised in the Order for Reference

31. In the light of the above, the United Kingdom refers to paragraph 4 of the Order for Reference, which states that:

> "The appellant has claimed that the English judgments cannot be recognised, on the ground that they are contrary to public policy, since his rights of defence were infringed in the proceedings which led to him being ordered to pay huge sums. In fact, the English judge had found Marco Gambazzi to be in contempt of court, since he had failed to comply with court injunctions issued at the request of DCC and CIBC, claiming that the documentation requested was not available and that, in any event, he could not comply for reasons of confidentiality and professional secrecy, and in order to protect his own position in relation to criminal proceedings instigated against him in Switzerland following a complaint by DCC. The English judge considered those arguments to be unfounded and issued a debarring order excluding Marco Gambazzi from the proceedings. The proceedings had therefore continued until the English court made its decisions in the enforced 'absence' of the defendant, without permitting him to put forward or substantiate any form of defence."

32. With the benefit of the facts as set out in Section III of the observations above, the United Kingdom emphasises the following:

a. Mr Gambazzi failed to comply with the disclosure requirements of the Freezing order of 26 February 1997, and with both the first and second sets Unless orders of 10 July and 13 October 1998 respectively. It was these circumstances which directly led to Mr Gambazzi being debarred from defending the claim;

b. The judgment of 13 October 1998 recorded that it was common ground that Mr Gambazzi had failed to comply and had no intention of complying with the orders;

c. The United Kingdom understands that the terms of the disclosure orders were such that they expressly provided that any document that Mr Gambazzi claimed was privileged or would involve the risk of his being prosecuted would be protected from disclosure;

d. Any "enforced absence" of Mr Gambazzi from the proceedings leading to a judgment against him was a direct result of his persistent failure to comply with the disclosure requirements of the Freezing order of 26 February 1997 and the subsequent two sets of unless orders;

e. Mr Gambazzi's claim that his rights of defence were infringed in the proceedings was, itself, examined and rejected by the English High Court during the course of those proceedings;

f. It would appear that Mr Gambazzi did not take all steps available to him to appeal the unless orders nor to apply to have the judgment of 10 December 1998 set aside.

33. Paragraph 4 of the Order for Reference continues as follows:

> "In support of his own argument, the appellant has cited the orders made by the Swiss courts (order of the Court of Appeal of the Canton of Ticino of 25 February 2004 and order of the Federal Court of 9 November 2004), refusing recognition of the English judgments in Switzerland on the ground that they infringe the rule laid down in Article 27(1) of the Lugano Convention – which mirrors Article 27 of the Brussels Convention."

34. In that respect, the United Kingdom draws attention to the fact that:

    a. While it is true that the judgment of the Federal Court of 9 November 2004 refused recognition and enforcement of the judgment of the English High Court, this refusal was based on a different violation of Article 6(1) of the ECHR, namely that Mr Gambazzi had been denied the right to examine certain documentation withheld by his previous lawyer [Annex 5].

    b. The Second Civil Chamber of the Court of Appeal in its judgment of 23 November 2000 had held that the judgment of the English High Court could not be enforced because of the objection raised under Article 27(1) of the Lugano Convention, finding that "the procedures for the taking of evidence, as implemented, through the Mareva injunction, by the English judge, do not in themselves conflict with public policy so much as the consequence of the imposed preclusion of the rights of the defence" [Annex 5 at 3.5]. However, this finding was overturned on appeal by the Federal Court of 9 November 2004, which held as follows [Annex 6 at 3.3.5]:

    > "contrary to what was alleged by the Ticinese Court, the contempt of court proceedings are not "too eccentric" compared with the average standard shared by other state legal systems. As also pointed out by the appellants, debarment and non-appearance are not concepts unfamiliar to the Swiss legal system. The fact that English law punishes the failure to comply with a court injunction with harsher consequences than those usually envisaged in Switzerland, is not sufficient reason to define the English procedure as being 'too eccentric'" (at 3.3.4).

V Legal submissions

(a) Relevant provisions of the Brussels Convention

35. In matters relating to the recognition and enforcement of judgments, the rule of principle, set out in the first paragraph of Article 31 of the Brussels Convention, provides that a judgment given in a Contracting State and enforceable in that State is to be enforced in another Contracting State when, on the application of any interested party, it has been declared enforceable there.

36. Under the second paragraph of Article 34, "[t]he application may be refused only for one of the reasons specified in Articles 27 and 28."

37. Article 27, point 1, of the Brussels Convention states:

> "A judgment shall not be recognised:
>
> 1. if such recognition is contrary to public policy in the State in which recognition is sought."

38. Article 28, third paragraph, of the Brussels Convention states:

> "Subject to the provisions of the first paragraph, the jurisdiction of the court of the State of origin may not be reviewed; the test of public policy referred to in point 1 of Article 27 may not be applied to the rules relating to jurisdiction."

39. Article 29 and the third paragraph of Article 34 of the Brussels Convention provide:

> "Under no circumstances may a foreign judgment be reviewed as to its substance."

(b) Legal principles

40. According to the well-established jurisprudence of the Court, firstly, the purpose of the Brussels Convention is to facilitate, to the greatest possible extent, the free movement of judgments by providing for a simple and rapid enforcement procedure (see, *inter alia*, Case C-7/98 *Krombach* [2000] ECR I-1935, paragraph 19).

41. Second, the Brussels Convention is necessarily based on the trust which the Contracting States accord to one another's legal systems and judicial institutions. It is that mutual trust which has enabled a compulsory system of jurisdiction to be established, which all the courts within the purview of the Convention are required to respect, and as a corollary the waiver by those States of the right to apply their internal rules on recognition and enforcement of foreign judgments in favour of a simplified mechanism for the recognition and enforcement judgments (Case C-116/02 *Gasser* [2003] ECR I-14693, paragraph 72; Case C-159/02 *Turner* [2004] ECR I-3565, paragraph 24).

42. Third, so far as Article 27 of the Brussels Convention is concerned, the Court has held that this provision must be interpreted strictly inasmuch as it constitutes an obstacle to the attainment of one of the fundamental objectives of the Convention (Case C-414/92

Solo Kleinmotoren v Boch [1994] ECR I-2237, paragraph 20). With regard, more specifically, to recourse to the public-policy clause in Article 27(1) of the Convention, the Court has made it clear that such recourse is to be had only in exceptional cases (Case 145/86 *Hoffmann v Krieg* [1988] ECR 645, paragraph 21, and Case C-78/95 *Hendrikman and Feyen v Magenta Druck & Verlag* [1996] ECR I-4943, paragraph 23).

43. In reviewing the limits within which the courts of a Contracting State may, in such exceptional cases, have recourse to the concept of public policy for the purpose of refusing recognition to a judgment emanating from a court in another Contracting State, the Court of Justice has had regard to fundamental rights, referring to the general principle of Community law, which is also protected by Article 6(1) of the ECHR, that everyone is entitled to a fair legal process (*Krombach*, paragraph 26, citing Case C-185/95 P *Baustahlgewebe v Commission* [1998] ECR I-8417, paragraphs 20 and 21, and Joined Cases C-174/98 P and C-189/98 P *Netherlands and Van der Wal v Commission* [2000] ECR I-1, paragraph 17).

44. That said, the Court of Justice has made clear that recourse to the public-policy clause in Article 27(1) of the Brussels Convention can be envisaged only where recognition or enforcement of the judgment delivered in another Contracting State would be at variance to an unacceptable degree with the legal order of the State in which enforcement is sought inasmuch as it infringes a fundamental principle. In order for the prohibition of any review of the foreign judgment as to its substance to be observed, the infringement would have to constitute a manifest breach of a rule of law regarded as essential in the legal order of the State in which enforcement is sought or of a right recognised as being fundamental within that legal order.

45. In the present case, the referring court asks, in essence, whether a judgment of a Contracting State rendered in civil proceedings in which a party was debarred from presenting his defence pursuant to a court order because of that party's persistent and intentional failure to comply with previous orders in the same proceedings is contrary to public policy within the meaning of Article 27(1) of the Brussels Convention. The United Kingdom respectfully suggests that the Court of Justice ought to direct the Italian court to conclude that a judgment rendered in such circumstances is, for the reasons set out below, not contrary to public policy within the meaning of that provision.

46. In the first place, while it is an established principle of Community law that the Brussels Convention in reaching for its aim of securing the simplification of formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals, must not achieve that aim by undermining the right to a fair hearing, it is equally well established that the right to a fair hearing is not absolute and maybe subject to certain limitations.

47. The European Court of Human Rights has, on several occasions, ruled specifically that certain rules of court procedure which impose such limitations are perfectly compatible with Article 6(1):

> "[Article 6(1)] may be subject to legitimate restrictions such as statutory limitation periods, security for costs orders, regulations concerning minors and persons of unsound mind (see *Stubbings and Others v the United Kingdom*, judgment of 22 October 1996, *Reports* 1996-IV, pp. 1502-03, §§ 51-52; *Tolstoy Miloslavsky v the United Kingdom,* judgment of 13 July 1995, Series A no. 316-B, pp. 90-81, §§ 62-67; and [*Golder v the United Kingdom*, Series A no. 18,] pp. 19, § 39).
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> Where the individual's access is limited either by operation of law or in fact, the Court will examine whether the limitation imposed impaired the essence of the right and, in particular, whether it pursued a legitimate aim and there was a reasonable relationship of proportionality between the means employed and the aim sought to be achieved (see *Ashingdane v the United Kingdom,* judgment of 28 May 1985, Series A no. 93, pp. 24-25, § 57)."
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> (see *Z and others v the United Kingdom* (Application no 29392/95), judgment of 10 May 2001, paragraph 93)

48. This assessment must be made in view of the margin of appreciation accorded to States, which, the United Kingdom respectfully submits, is particularly wide in circumstances where national procedural rules are subject to scrutiny, and in view the context of the proceedings as a whole.

49. In the case of *Z and others v the United Kingdom* (Application no 29392/95), judgment of 10 May 2001, the European Court of Human Rights, sitting as a Grand Chamber, made such an assessment of the striking out procedure, which is regarded as an important feature of English law. It performs the function of securing speedy and effective justice by allowing a court to decide promptly which issues need full investigation and trial, and disposing summarily of others and, by that procedure, it can be determined at an early stage, with minimal cost to the parties, whether the facts as pleaded reveal a claim existing in law. The Court of Human Rights concluded that the application of such a procedure in the circumstances of that case did not violate Article 6(1) of the ECHR.

50. The referring court has, in the Order for Reference, acknowledged that "every judicial system needs to make provision for a procedural penalty which produces negative consequences for a party which refuses to comply with a court order", and that the Italian legal system also provides for such mechanisms.

51. Indeed, the rules applying to proceedings before the Court of Justice itself accommodate such legitimate restrictions, providing that a party which fails to enter a defence to a claim made against it may have judgment entered against it by default, with the defendant having a period of one month to apply for the judgment to be set aside: see Article 94 of the Rules of Procedure of the Court of Justice of the European Communities.

(c) Application of the legal principles to the facts of the case

52. The United Kingdom submits that a judgment of a court of a Contracting State rendered where the defendant had, for reasons such as arise in the present case, been debarred from defending the claim, should not, in principle, be considered as contrary to public policy within the meaning of Article 27(1) of the Brussels Convention. As the referring court itself recognised (paragraph 6 of the Order for Reference), the starting point for its analysis must be as follows.

53. Firstly, the Italian court where recognition and enforcement is sought should not review the substance of the judgment of the English court, being a court with proper jurisdiction under the Brussels Convention over the substance of the case: the referring court acknowledged that there could be no question of it evaluating the merits of the line of reasoning followed by the English judge in the debarring order, in so far as that judge held to be unfounded and unreliable the justification put forward by counsel for the defence for Mr Gambazzi's failure to comply with the Freezing order.

54. Secondly, the Italian court would have to consider whether:

    a. There were exceptional circumstances justifying recourse to Article 27(1); and

    b. The enforcement of the judgment would constitute a manifest breach of a rule of law regarded as essential in the Italian legal order.

55. As regards (a), the exceptional circumstances justifying recourse to Article 27(1), the special nature of such cases should be such that they must properly be considered to fall outside the wide margin of appreciation in procedural matters that is accorded to Contracting States in ensuring the fair and efficient administration of justice by the courts. The United Kingdom respectfully submits that this criterion of exceptional circumstances would clearly not be met if, as in the present case, a debarment order is made in respect of a party as a result of his deliberate choice — namely his repeated decision to refuse to disclose information relating to his assets as required by court orders pursuant to a Freezing order — and in circumstances in which he knew of the consequences for him of maintaining that choice.

56. The United Kingdom adds that the English courts exercise considerable care before ordering a defendant to disclose information about his assets. In particular, the courts will not order such disclosure if to do so would invite a significant risk of self-incrimination and that a defendant might be subjected to criminal penalties in proceedings in another state. This was expressly recognised by the former Chief Justice, Lord Bingham of Cornhill, in the case of *Credit Suisse Trust SA v Cuoghi* [1997] 3 All ER 724 at 736.

57. As regards (b), the enforcement of the judgment should be considered to constitute a manifest breach of a rule of law only in circumstances where the essence of the right to a fair hearing is impaired, and where that limitation does not pursue a legitimate aim and was disproportionate. The United Kingdom invites the Court to consider that none of these conditions was met in the present case.

58. The United Kingdom is fully cognizant of the fact that Article 6(1) of the ECHR requires attention to be addressed to a matter which has always been implicit in cases of this kind, namely that the effect of the court's giving judgment where the defendant is debarred from defending is that the defendant may be deprived of a trial of his defence on the merits. However, the United Kingdom asks the Court of Justice to bear in mind that there was a legitimate aim pursued by the imposition of the orders in the present case, namely the imposition of sanctions to secure compliance with court orders, which were, in turn, made to ensure the effectiveness of Freezing orders. That sanction was proportionate, as it was reasonably necessary to achieve that aim, and the essence of the right of access to court was not destroyed because the litigant had the opportunity to seek relief against the sanctions, which he did only in part. Moreover, the essence of

that right was not destroyed even if such relief, which was sought, was refused as it was in the present case, since the litigant always had the opportunity to comply with the court orders and to help progress the case to trial.

59. In that regard, the United Kingdom reiterates that:

a. Mr Gambazzi had persistently failed to comply with the disclosure requirements of the Freezing order of 26 February 1997, and with both the first and second sets unless orders respectively of 10 July and 13 October 1998. It was these circumstances which directly led to Mr Gambazzi being debarred from defending the claim;

b. The judgment of 13 October 1998 recorded that it was common ground that Mr Gambazzi had failed to comply and had no intention of complying with the orders;

c. The United Kingdom understands that the terms of the disclosure orders were such that they expressly provided that any document that Mr Gambazzi claimed was privileged or would involve the risk of his being prosecuted would be protected from disclosure;

d. Any "enforced absence" of Mr Gambazzi from the proceedings leading to a judgment against him was a direct result of his persistent failure to comply with the disclosure requirements of the Freezing order of 26 February 1997 and the subsequent unless orders;

e. Mr Gambazzi's claim that his rights of defence were infringed in the proceedings was, itself, examined and rejected by the English High Court during the course of those proceedings, in a fully reasoned judgment.

60. It is for those reasons, set out in the preceding two paragraphs, that the United Kingdom respectfully suggests that the present proceedings are significantly different from those arising in the case of *Krombach*. In that case, the Court of Justice considered that a court of a Contracting State in which enforcement of a judgment is sought can take account of the fact that, in an action for damages based on an offence, the court of the State of origin refused to hear the defence of the accused person, who was being prosecuted for an intentional offence, solely on the ground that that person was not

present at the hearing. Aside from the fact that *Krombach* concerned both criminal and civil proceedings, the material differences between that case and the present proceedings are that: (i) it would appear that Mr Krombach had one opportunity to appear in person before the court, following which he was found to be in contempt and judgment was given against him in the absence of a defence: by contrast, Mr Gambazzi appeared, with legal representation, before the court on a number of occasions and had a significant period of time within which to comply with court orders before he was debarred from defending the claim in question; (ii) the Court of Justice's judgment makes no mention of Mr Krombach having raised the issue of an alleged breach of his right to a fair hearing before the French court, which was the court of the State of origin: in the present proceedings, Mr Gambazzi's claim was examined by the English High Court during the course of the proceedings, and dismissed in a fully reasoned judgment. Moreover, Mr Gambazzi had the opportunity to seek further relief.

61. In making its assessment, the Court of Justice is respectfully requested to remind the referring court of the yardstick which it itself identified in the Order for Reference, namely that no significance may be attached to the mere fact that Italian procedural rules do not provide for a mechanism akin to contempt of court.

62. Moreover, the right enshrined in Article 6(1) of the ECHR falls to be assessed by reference to the proceedings taken as a whole in the Contracting State where the judgment was delivered.

    a. In the first place, Mr Gambazzi sought leave to appeal the second set of debarment orders to the Court of Appeal, which was refused. It would appear that Mr Gambazzi did not seek leave to appeal directly from the Court of Appeal itself.

    b. In the second place, at the hearing on 12 October 1998 before Mr Justice Rattee, following which the second set of debarment orders were made, full submissions on the issue of whether such orders were compatible with Article 6(1) of the ECHR were made by Mr Gambazzi's barrister before the court. Those arguments were dismissed with full reasons by the court in its judgment of 13 October 1998. In the light of this, the United Kingdom emphasises that there is no suggestion that in any of the proceedings in

which the Article 6(1) issues were considered there was any taint of unfairness.

c. In the third place, Mr Gambazzi made no application to have set aside the judgment entered in default of 10 December 1998. [2]

63. In that regard, the United Kingdom refers also to the judgment of the Swiss Federal Court which, in the context of the recognition and enforcement of the judgment of the English High Court in Switzerland, considered and rejected Mr Gambazzi's allegations that the English High Court had violated his right to a fair hearing.

64. Further, it was open to Mr Gambazzi to pursue his complaint before the European Court of Human Rights (the United Kingdom has no record of him having brought any such claim against it). However, it is unlikely that such a complaint would have been properly admissible. Under Article 35(1) of the ECHR, a party claiming a breach of his rights thereunder must first have exhausted his domestic remedies in that regard. When the High Court, in its judgment of 13 October 1998, rejected Mr Gambazzi's arguments regarding an alleged breach of Article 6(1) of the ECHR, he could have sought leave from the Court of Appeal to appeal that judgment, which he did not. He could also have applied to have set aside the judgment of 10 December 1998, which he did not. Accordingly, to allow him now to argue that he was deprived of the opportunity to present a defence in circumstances which are contrary to the right to a fair hearing before the Italian courts would be to permit him to circumvent the requirement in the ECHR itself that obliges him to exhaust his domestic remedies. The United Kingdom respectfully submits that this would have the consequence of undermining the scheme and enforcement of the ECHR, an outcome which would be inconsistent with, and not

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[2] The United Kingdom draws attention to the fact that, in proceedings related to the instant proceedings, the Court of Appeal (England and Wales) was asked to consider a very similar point. The judgment is reported as *CIBC Mellon Trust Co and others v Stolzenberg and others* [2004] EWCA Civ 827, and the relevant findings (the headnote and paragraph 161 of the judgment) [annex 7]. The proceedings concerned the same claim as in issue in the present proceedings. Certain of the other defendants to the claim had also failed to comply with unless orders which had been made to ensure the effectiveness of the same freezing order at issue in the present proceedings. Those defendants were companies of which Mr Gambazzi was director and managing director respectively. They sought to have set aside the judgments entered in default of their failure to comply with the court orders. The judge refused to set aside the judgments, and the defendants appealed. The Court of Appeal considered that the defendants' Article 6(1) rights had not been infringed, and the appeal was dismissed.

intended by, the Brussels Convention, in particular, and the Community legal order, in general.

65. Finally, the United Kingdom relies upon the principle that when an issue becomes *res judicata* in proceedings before the court of a Contracting State which properly has jurisdiction under Title II of the Brussels Convention that issue should not, in principle, be capable of review by the courts of another Contracting State. This is the result, not only of Articles 29 and 34(3), but also of Article 26 of the Convention, pursuant to which a judgment is entitled to automatic recognition without any special procedure being required, and of Article 27, which lists exhaustively the circumstances in which a court in a Contracting State may refuse recognition of a judgment from the court of another Contracting State.

66. In the United Kingdom's respectful submission, this principle falls to be applied in the present case. In the course of reaching the judgment which is sought to be enforced by the Italian courts, the English High Court heard full submissions on the merits regarding the compatibility of the debarring orders made against Mr Gambazzi with Article 6(1) of the ECHR. The High Court considered there to be no incompatibility, and its judgment on this issue ought to be considered to be *res judicata* before the Italian courts.

67. Accordingly, the questions referred should be answered as follows:

> "Article 27, point 1, of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, as amended by the Convention of 9 October 1978 on the Accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland and by the Convention of 25 October 1982 on the Accession of the Hellenic Republic, must be interpreted as meaning that a judgment of a court or tribunal of a Contracting State rendered in civil proceedings in which a party was debarred from presenting his defence pursuant to a court order because of that party's persistent and intentional failure to comply with previous orders in the same proceedings, cannot be considered to be contrary to public policy."

Zoë Bryanston-Cross

Agent for the United Kingdom

10 December 2007

List of Annexes to the Written Observations of the United Kingdom

Annex Reference	Page number	Description of Annex	Length of Annex (pages)	Page and paragraph number
A1	22 - 29	*Canada Trust Co and others v Stolzenberg and others*, judgment of the High Court of Justice (Chancery Division), England and Wales, of 10 December 1998 and order of 17 March 1999.	8	Page 2, para 2
A2	30 - 43	Civil Procedure Rules 1998, r.3 and Overriding Objective	14	Page 4, para 9
A3	44 - 98	*Canada Trust Co and others v Stolzenberg and others (No 3)*, Transcript of proceedings, 12 October 1998	55	page 73, para 23
A4	99 - 111	*Canada Trust Co and others v Stolzenberg and others (No 3)* [1998] All ER (D) 449	13	page 7 para 24
A5	112 - 136	*CIBC Mellon Trust Company v Marco Gambazzi,* judgment of the Federal Court (Switzerland) of 23 November 2000	25	page 11, para 34(a)
A6	137 - 153	*CIBC Mellon Trust Company v Marco Gambazzi*, judgment of the Second Civil Chamber of the Court of Appeal (Ticino Canton, Switzerland) of 9 November 2004	17	page 11, para 34(b)
A7	154 - 218	*CIBC Mellon Trust Co and others v Stolzenberg and others* [2004] EWCA Civ 827	65	Page 19, footnote 2